

EXHIBIT 3

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Residential Funding Company,)
LLC,) File No. 13-CV-3511
(RHK/FLN)
Plaintiff,)
vs.) Minneapolis, Minnesota
Sierra Pacific Mortgage) March 24, 2014
Company, Inc.,) 9:36 a.m.
Defendant.) DIGITAL AUDIO
RECORDING TRANSCRIPT

BEFORE THE HONORABLE FRANKLIN L. NOEL
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTIONS HEARING)

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1 P R O C E E D I N G S

2 I N O P E N C O U R T

3
4 THE COURT: Okay. This is Residential Funding
5 versus Sierra Pacific Mortgage Company, Inc. Let's get
6 everybody's appearance on the record. For the Plaintiff.

7 MR. HEEMAN: Good morning, your Honor. Donald
8 Heeman, Felhaber Larson. And with me is Peter Calamari from
9 Quinn Emanuel Urquhart & Sullivan appearing pro hac vice,
10 and Mr. Calamari will be arguing today.

11 THE COURT: Okay. For the Defendant.

12 MR. JENKINS: Good morning, your Honor. Jonathan
13 Jenkins, Jenkins, LLC, on behalf of Sierra Pacific Mortgage,
14 Incorporated. And with me is Mr. Richard Thomson of Lapp,
15 Libra, Thomson.

16 THE COURT: Okay. We're here for a hearing on the
17 Plaintiff's Motion to File a First Amended Complaint.
18 Mr. Calamari, you're up.

19 MR. CALAMARI: Thank you, your Honor, and good
20 morning. Thank you especially for letting me appear here.

21 This is a straightforward application to amend a
22 complaint. Rule 15 provides that amendments should be
23 freely granted when the interests of justice so require.
24 The application comes pre answer, pre a Rule 16 scheduling
25 conference, pre any adjudication on the merits of the

1 original complaint. Unlike some of the cases cited by
2 Defendants in their opposition papers, the First Amended
3 Complaint -- it is the First Amended Complaint. It is not a
4 series of amended complaints which have been dismissed and
5 attempts to cure problems that a court has identified in an
6 original complaint. There's been no adjudication on the
7 merits of the original complaint. Defendant's opposition
8 papers don't even bother to address the standards for
9 amended --

10 THE COURT: Let me ask you this because you may be
11 aware this isn't the only case we have with your client.

12 MR. CALAMARI: I am aware, your Honor.

13 THE COURT: What generated the perceived need to
14 amend the complaint and is this something we're gonna see in
15 the multitude of other cases that we have?

16 MR. CALAMARI: Your Honor, the answer to your
17 second question is yes. There will be amended complaints in
18 the other cases to reflect a more robust complaint in each
19 case with more specific information. That's not to say that
20 we think the first complaints wouldn't have withstood a
21 Motion to Dismiss, but a Motion to Dismiss had been filed
22 and the Motion to Dismiss raised issues about the pleadings
23 and we tried to address those issues.

24 THE COURT: So this is in response to the Motion
25 to Dismiss to attempt to avoid that?

1 MR. CALAMARI: Correct. Well, again, your Honor,
2 it is trying to make the Motion to Dismiss utterly and
3 completely irrelevant.

4 THE COURT: Okay.

5 MR. CALAMARI: We think the original complaints
6 would have certainly satisfied the *Twombly* standards for a
7 breach of contract and a breach of indemnity obligation
8 agreement, which is the two issues raised here. No fraud is
9 alleged in these complaints so there's no specificity
10 requirement. It's a very straightforward pleading
11 requirement. But because a Motion to Dismiss was made and
12 it complained about lack of detail, the subsequent
13 complaints provide substantially more detail on the nature
14 of the breaches than the original complaints provided.

15 THE COURT: Okay. And on the -- so is this the
16 first of many or are we just one of many that we're right in
17 the middle of? Because all of these cases are staying, as I
18 understand it, with the individual judges, at least for now.
19 Have other judges in this district addressed a motion like
20 this to amend in response to a Motion to Dismiss or is this
21 the first of many?

22 MR. CALAMARI: This is the first. We don't think
23 there will be many because other defendants have just
24 consented to the amended complaint. Some have asked us to
25 amend the complaint before they draft a Motion to Dismiss.

1 There are a few other complaints where there is a Motion to
2 Dismiss and an amended complaint has been filed and those
3 Defendants have in effect said they'd like to go ahead with
4 their Motion to Dismiss even in the face of the amended
5 complaint. And we have asserted some opposition to that on
6 the grounds that the amended complaint moots out the
7 original complaint. But this is the first hearing on this
8 particular issue.

9 THE COURT: Okay. And how do you address -- so
10 then going to the substance of the merits, as I understand
11 it the Defendants say you still haven't identified a single
12 loan that was nonconforming and therefore you're entitled to
13 any compensation.

14 MR. CALAMARI: I think this is one of the big
15 fallacies in their papers. If you look at paragraph 42 to
16 the complaint, paragraph 42 to the complaint identifies some
17 16 -- I can check the complaint for the exact number, but --
18 sorry I left it over here. It identifies quite a number
19 of -- I can give you the exact number -- yeah, I believe
20 it's 16 separate loans, individual loans that have defects
21 in them. It specifies the loan number. It gives you the
22 nature of the defect. It provides information about why the
23 defect is material. To say that we haven't identified a
24 specific loan is simply wrong. There's just no -- no basis
25 for that claim.

1 Equally they don't really admit -- while they make
2 that bold statement, what they really say is a few of these
3 loans might be subject to settlement agreements. And that's
4 the bulk of their papers which don't belong on a motion --
5 opposition for a Motion for Leave to Amend. They make
6 summary judgment type arguments. They say, well, a couple
7 of those loans might be subject to settlement agreements.

8 Well, that's an issue to be determined after they
9 put in an answer and they raise a defense, and then that can
10 be looked at. The settlement agreements clearly don't cover
11 all of the loans in question.

12 THE COURT: Do we know if any of the 16 specifics
13 that are listed in paragraph 42 are governed by settlement
14 agreements or don't we know?

15 MR. CALAMARI: To my knowledge, three or four of
16 them might be covered by settlement agreements but the words
17 in those settlement agreements are sufficiently ambiguous to
18 make it unclear as to whether there is a release of the
19 particular indemnification claims here. But we also make
20 quite clear in the complaint that we are not seeking to
21 recover on any loans that were repurchased by Sierra. And
22 so even if one or two of these examples is covered by a
23 settlement agreement, the complaint makes clear that we are
24 not seeking to recover for those particular loans.

25 Now, it's important to understand, your Honor,

1 these cases not only in this court but there are cases on
2 repurchase claims all over the country. Some of those cases
3 have been tried, some of those cases are settled, many of
4 them are still in -- winding their way through the courts.
5 And virtually every single one of those cases has recognized
6 that the volume of loans is simply too big to allow for
7 either pleading or proving that every one individual loan
8 that breached was a breach. All of the courts that have
9 looked at these issues have resorted to a sampling approach.
10 That is, take a statistically normal sample. See if -- you
11 use 400 loans or a hundred loans, if 40 of them are
12 materially a breach, then you could assume that across the
13 whole pool 40 percent would be a material breach. So no
14 court has required pleading and proving defect in every
15 single defective loan.

16 But, again, we're getting to -- getting further
17 down the road. All we have here is whether or not we should
18 have leave to amend the complaint. We don't even in theory
19 have to establish that a complaint states a claim on this
20 motion. The -- that is yet to be decided. All we really
21 need to show is that it's plausible. And at this point it's
22 more than plausible. This is -- the detailing provided in
23 the amended complaint is very straightforward. These are
24 simple claims, and we think that the motion should be
25 granted.

1 THE COURT: Okay.

2 MR. CALAMARI: I would make one other point.

3 There is a case, *Streambend*, that we cited in our papers and
4 the Defendants have endorsed. In that complaint -- in that
5 case there was initially a state court proceeding. The
6 state court proceeding went to judgment. The disappointed
7 party in that proceeding commenced a federal court
8 proceeding, filed a complaint, then filed an amendment as of
9 right. Then when that complaint was dismissed, made a
10 motion for leave to file an additional complaint. That
11 motion was granted. When that complaint was dismissed, made
12 a motion to file a third amended complaint. That motion was
13 granted in part.

14 The court didn't finally dismiss the case and
15 refused further amendment until the Motion for the Fourth
16 Amended Complaint, after three previous active adjudications
17 on the merits of the complaints. And so, your Honor, to me,
18 this is a motion that ought to be granted and we should have
19 no further argument on it. Thank you.

20 THE COURT: Okay. It's our practice to let the
21 other side argue, just because.

22 MR. CALAMARI: I apologize.

23 THE COURT: All right. Go ahead.

24 MR. JENKINS: Thank you, your Honor, and may it
25 please the Court:

1 This, your Honor, is the First Amended Complaint
2 that RFC seeks leave to file. It is 549 pages long; 96
3 percent of it consists entirely of exhibits. Sierra
4 contends that, particularly in light of the fact that this
5 is the First Amended Complaint of many that is about to hit
6 this Court's docket, that the Court should deny RFC leave to
7 amend for three reasons: Futility, bad faith, and undue
8 prejudice.

9 First, however, I would like to briefly address
10 certain arguments that both were and were not made in both
11 RFC's reply brief and in Mr. Calamari's oral presentation,
12 the first which was nowhere addressed. Now, Exhibit C to
13 this complaint is a 195-page list of 9,000 loans that Sierra
14 sold to RFC over a period ranging from the year 2000 all the
15 way through September 2007.

16 Now, we don't know precisely or in any sense of
17 the word how many of these loans or which loans RFC contends
18 to be defective. We know that it is something of a moving
19 target. In the original complaint RFC said that dozens of
20 Sierra loans were allegedly defective. In the proposed
21 First Amended Complaint they now have said that that number
22 is in the hundreds. And on page 5 of RFC's reply they are
23 now contending that Sierra sold thousands of defective loans
24 to RFC and now it faces hundreds of millions of dollars in
25 liability as a result.

1 THE COURT: But isn't that why God invented
2 discovery?

3 MR. JENKINS: Well, in theory yes. But under
4 *Twombly-Iqbal* the doors of discovery don't get opened until
5 Plaintiff has first proved that they actually have a
6 meritorious case. And the issue here is --

7 THE COURT: That's kind of an overstatement of
8 *Iqbal*. They have to allege a plausible claim, correct?

9 MR. JENKINS: Plausible being the key word.

10 THE COURT: Right.

11 MR. JENKINS: Now here, Exhibit C, as I mentioned,
12 the last loan, the latest loan on this list, was purchased
13 by Sierra in September 2007. Minnesota has a six-year
14 statute of limitations. This action was filed on December
15 14th, 2013. So we go back six years to December 14th, 2007,
16 every single loan on this list is time barred. And we cite
17 in our brief the *Enervations* case which makes clear that
18 under Minnesota law a breach of contract accrues for statute
19 of limitation purposes upon the moment of breach, in this
20 case when the loan was sold, regardless of whether or not
21 damages have yet to occur and do not occur until some future
22 point in time.

23 Now, neither the original complaint, the amended
24 complaint, or even the reply brief which doesn't even
25 address our statute of limitations argument, nothing is said

1 regarding potential invocation of any sort of tolling on the
2 statute of limitations. So we now have a claim that appears
3 to be completely facially time barred, and that was the
4 exact basis in the *Streambend* decision which was very
5 recent, I think January 28th, 2014, for denying leave to
6 amend on the basis that all of the claims asserted were
7 facially time barred.

8 Now, moving onto --

9 THE COURT: Let me interrupt there. What's in
10 Exhibit A and B? In other words, are all of the claims --
11 is it your contention that Exhibit C is all of the loans
12 that are the subject of this complaint and therefore the
13 entire complaint is time barred or just those that are
14 referenced in Exhibit C?

15 MR. JENKINS: Well, it would appear that they have
16 attached a list of 9,000 loans and they have represented in
17 the FAC that these are the loans on which RFC -- it's a
18 little unclear. They said these are -- this is the universe
19 of loans that was sold. They haven't identified, you know,
20 other than dozens/hundreds/thousands, how many of them they
21 allege to be defective. But the fact of the matter is it
22 doesn't matter if any of them are defective because they are
23 all timed out under the statute of limitation.

24 THE COURT: Okay. And Exhibits A and B are not
25 lists of more recent loans?

1 MR. JENKINS: No, your Honor. Exhibit A is a
2 nine-page list of the contractual agreement between Sierra
3 and RFC.

4 Exhibits B-1 through B-15 consists of 513 pages of
5 excerpts from various unspecified versions of the Client
6 Guide applicable from various times from who knows when to
7 who else knows when.

8 And I would like to say a few words about these
9 example loans that RFC has offered in his proposed FAC. And
10 first I would like to go to paragraph 17 which discusses --
11 really the only place that discusses them at all -- the 500
12 plus pages in Exhibits B-1 through B-15. "The complete
13 versions" -- and I'm reading the second sentence of
14 paragraph 17. "The complete versions of the Client Guide
15 are known to the parties and are too voluminous to attach in
16 their entirety: The omitted portions of the client guides
17 do not affect the obligations set forth in this amended
18 complaint."

19 Not true, your Honor. If you could turn to page
20 15, paragraph 42 a, b and c. They are just the first three
21 of the example loans that RFC has provided, at least four of
22 which we already know have been expressly released and RFC
23 has not even offered to remove those loans from this list.

24 Now, Exhibit A talks about a loan that was
25 allegedly deficient that was originated by RFC. And in the

1 fourth line in paragraph 42 a says: "RFC's Client Guide
2 prohibited the sale to RFC of second lien loans under these
3 circumstances because of the obvious risk posed by negative
4 amortizing first liens."

5 Well, if you look through -- again, I'm going to
6 ask your Honor to take my word on this -- if you look
7 through Exhibits B-1 through B-15 there's absolutely nothing
8 about the standards for when or when not RFC will accept a
9 second lien mortgage that is inferior to a first that
10 negatively amortized. Now the one place that that would be,
11 if you look at the index to Exhibit B-1, second lien, that's
12 a home equity loan, it should be somewhere in 6G. And now
13 I'm looking at page 9 to Document 49-3, which sets out the
14 RFC's Home Equity Loan Program.

15 So in the first instance the statement that B-1
16 through B-15 contains all of the relevant provisions and
17 that no immaterial or irrelevant provision is not included
18 is just completely wrong. The larger point for
19 *Iqbal-Twombly* purposes is that, okay, yes, they list some
20 loans and they list some problems that the loans purportedly
21 have, and they say, Oh, these problems were material. But
22 nowhere, not once, do they actually go back to the actual
23 contractual obligations and even try to say, okay, in this
24 -- for example, the sale of RFC of negative lien loans under
25 these circumstances because of the obvious risk posed by

1 negative amortizing first liens. Nowhere, not once, in any
2 of these I think 17 examples do they give an actual
3 provision that was actually breached.

4 And we think we know why that's so. It's because
5 they are -- RFC does not actually have the ability to go out
6 and find its loan files or search through electronic loan-
7 level data. They are using the information that was used by
8 the Plaintiffs in the securitized mortgage litigation cases
9 filed against RFC by, among other lawyers, Mr. Calamari
10 himself. And so they are not actually doing their own work.
11 They are recycling the work of Plaintiff's lawyers, but that
12 work involved an entirely different set of representations
13 and warranties.

14 So they are not quite sure based on this limited
15 data which provisions of the client guides for RFC that any
16 of these loans actually violated. And under *Iqbal-Twombly*
17 maybe they don't have to do it dozens or hundreds or
18 thousands of times, however many loans are at issue, but
19 they ought to be able to do it at least once and they don't.

20 And in fact if you look at loan B, paragraph 42 b
21 in the FAC, it says: "Sierra Pacific had indeed failed to
22 verify the borrower's assets as was required by the Client
23 Guide." Well, where is that provision? I have no idea even
24 just looking at the table of contents, but certainly nothing
25 in Exhibits B-1 through B-15 says anything about the

1 requirement of correspondent lender to verify the borrower's
2 assets. Maybe it's in some other part of the manual, but I
3 don't know. And the First Amended Complaint says that
4 anything that's not in here is not relevant. That's clearly
5 not the case.

6 Same thing with 42 c. It turns out that Sierra
7 Pacific had never supplied any documentation of the
8 borrower's purported business and searches of various city
9 and state business records revealed no record whatsoever of
10 the borrower's business.

11 Well, okay. But again, what provision did that
12 breach specifically? Because, again, there's nothing in
13 this 513 page or 15 Exhibit Bs that speaks to an obligation
14 for Sierra Pacific or any other correspondent lender to
15 supply any documentation. So none of these examples
16 actually get by *Iqbal-Twombly* because they still don't tell
17 us what provision was actually breached. They missed that
18 critical step. And they contradict the language of earlier
19 in the First Amended Complaint that Exhibit Bs are all you
20 need to define the source of the obligation for all of the
21 loans at issue in this case. And their example loans show
22 that that is not truly the case.

23 I would like to say a few words about the release
24 agreements, and we've identified three of them. And those
25 release agreements create problems for RFC and in particular

1 this First Amended Complaint on three levels.

2 Now, first, the three that we've attached, the big
3 one is the December 17, 2007 agreement. And it lists 29
4 loans that are expressly released for all time. There are
5 covenants not to sue. There are express releases of any and
6 all claims and any and all rights moving forward. And yet
7 these loans are listed in Exhibit C and RFC actually uses
8 four of them as their example loans.

9 And that in and of itself is a violation of the
10 settlement agreement. There's no dispute as to authenticity
11 of these settlement agreements. And cases have held that
12 the Court may look beyond the realm of the pleadings to
13 documents embraced by the pleadings. That's the *Johnson v*
14 *Homecomings* decision that we cite. *Enervations* also stands
15 for that proposition. *Streambend* itself actually looked at
16 a reported document from the public assessor to determine
17 that all of the Defendants' proposed claims in the Amended
18 Complaint were time barred.

19 So -- and more concerning is the fact that for all
20 of these loans, and all of these settlement agreements, we
21 have a prevailing party attorney's fees provision which
22 shows sort of the fundamental problem here. No solvent
23 Plaintiff would actually bring claims predicated on these 39
24 loans or any of the others covered by this settlement
25 agreement because there would be a severe financial risk in

1 doing so. But in this case, we have a bankruptcy debtor
2 that sort of lacks the typical motivations to play by the
3 rules. They have no downside. They have no exposure to
4 counterclaims for attorney's fees or prevailing party
5 attorney's fees, judgments, and they are in liquidation.
6 They have absolutely no future. They have no skin in the
7 game. So they have absolutely nothing to lose by taking an
8 outside swing at Sierra and 75 plus other correspondent
9 lenders and hoping that they get lucky.

10 The second problem with the releases and covenants
11 not to sue is that, well, yes, they are in fact expressly
12 suing for continuing liability on loans that were previously
13 repurchased. And in fact if you look at paragraph 5 of the
14 First Amended Complaint in which RFC is talking about
15 repurchased loans, the very last sentence reads: "Even
16 those loans Sierra Pacific repurchased have continued to
17 contribute to RFC's losses and liabilities, and the parties'
18 agreement expressly provides that RFC may pursue additional
19 recoveries stemming from those loans." Well, no, they can't
20 under this settlement agreement which releases and covenants
21 not to sue with respect to those loans.

22 Furthermore, paragraph 43 of the proposed First
23 Amended Complaint says again, last sentence, "While Sierra
24 Pacific has over the parties' course of dealing repurchased
25 some individual loans, thereby acknowledging it sold

1 defective loans to RFC," which is not true because every
2 settlement agreement also contained a disclaimer of
3 wrongdoing provision that applied to both parties, "it has
4 in no way fully compensated RFC for the breaches or
5 representations or warranties or the losses stemming from
6 the universe of defective loans Sierra Pacific sold to RFC
7 over time."

8 Now, they say in their reply brief closure
9 provision that seems to suggest that no, we're not in fact
10 suing for liability on previously repurchased loans. If you
11 look at paragraph 33 of the proposed FAC, which is the
12 provision they quote, they say, Well, additionally, prior to
13 the commencement of this lawsuit, Sierra Pacific previously
14 conceded that certain of its loans to RFC were materially
15 defective. In that regard, Sierra Pacific has already paid
16 substantial sums to RFC to cover those defects. In this
17 action RFC is not seeking to recover on those loans."

18 I don't know what loans those are, your Honor.
19 Because, as I said, every settlement agreement contained a
20 non-liability and no admission of wrongdoing provision. So
21 when they talk about Sierra Pacific having previously
22 conceded that certain of its loans to RFC were materially
23 defective, not a clue what loans they are. But they are
24 certainly none of the loans in the settlement agreements at
25 issue because the parties agree that there was no admission

1 of fault with respect to any of those loans.

2 Now, the last and probably the most significant
3 problem posed by the one particular settlement agreement,
4 the December 19th, 2007 settlement, which again came after
5 every single loan listed in Exhibit C, all 9,000 of them.
6 And in that provision in return for payment of one million
7 dollars, RFC agreed to retroactively release Sierra from any
8 continuing liability on any loan that subsequently turned
9 out RFC discovered that they believed it was materially
10 defective.

11 Unless -- and there are two exceptions but this is
12 the one I want to focus on now -- unless RFC can show that
13 the loan went bad within one year. The borrower didn't make
14 12 consecutive monthly payments. As long as the loan didn't
15 go bad within one year, Sierra is released from any and all
16 liability on any of these loans.

17 Now, Sierra sold these loans to RFC. We don't
18 have the borrower payment information. And according to
19 attorney Jeff Lipps, who was RFC's counsel in the bankruptcy
20 action and testified several times, one instance we provided
21 in our opposition papers, that RFC doesn't have access to
22 the -- a great deal of the loan-level electronic data that
23 they would need in order to make a determination whether or
24 not a loan went bad within the first year.

25 And, you know, therefore, we're going to be facing

1 a lot of claims and we're going to have to expend a lot of
2 time and a lot of attorney's fees to establish the -- and
3 this I think, your Honor, is one aspect of undue prejudice.
4 You know, a regular solvent litigant would go do its
5 homework and fire up these systems and make sure that
6 whatever loans it was suing on did not violate a prior
7 release with an attorney's fees provision. And yet RFC's
8 attitude --

9 THE COURT: Let me make sure -- I think I
10 understand your position but let me make sure I'm clear on
11 the overall strategy. So if we deny their Motion to Amend,
12 the hearing on your Motion to Dismiss the original complaint
13 will go forward. You anticipate prevailing, and this case
14 is over?

15 MR. JENKINS: Ideally that would be nice. I am a
16 realist, your Honor, and I recognize that your Honor has
17 extremely broad discretion here. I don't know that a death
18 knell is necessarily the appropriate result. RFC does, I
19 think -- the case can be made that they have a right to go
20 back, to do their homework, to figure out whether or not
21 they have claims that aren't time barred, that aren't
22 released. They can allege with the level of specificity
23 required by *Iqbal-Twombly*. But it is not this complaint,
24 your Honor.

25 So --

1 THE COURT: So the scenario I just posited would
2 be your best case. The more realistic is that we deny the
3 motion but they go back and make another Motion to Amend
4 with a different amended complaint that more specifically
5 identifies which loans they contend are defective.

6 MR. JENKINS: And eliminates the ones that
7 patently violate the statute of limitations and that aren't
8 covered by the release.

9 THE COURT: And the releases.

10 MR. JENKINS: And that in fact one of the
11 decisions -- I won't get into it. But, yeah, I think in
12 essence a denial of leave to amend without prejudice. If,
13 say, this one, this document, not here, not today, not this
14 court. But if you go back and if you think you can do
15 another one and if you think that you can pass muster,
16 frankly, under Rule 11 in doing so, then I suppose I have to
17 concede that they would deserve another shot.

18 But this complaint has too many problems and it
19 would be unfair and unduly prejudicial to Sierra to have to
20 defend claims that are clearly meritless when at the end of
21 the day it's contracted for a remedy to recover attorney's
22 fees or counterclaim for breach of a covenant not to sue.
23 It's just something that's not going to work against a
24 bankrupt debtor.

25 THE COURT: Okay. Thank you.

1 MR. JENKINS: Thank you.

2 THE COURT: Anything else?

3 MR. CALAMARI: Just very quickly, your Honor.

4 The statute of limitations issue, what we didn't
5 hear is the fact that when the RFC entity went into
6 bankruptcy it tolls the statute of limitations. And
7 therefore, with regard to the breach of contract claims, the
8 statute of limitations stopped running, if you will, in
9 2011.

10 Equally, the indemnity claims, which are the
11 principal claims asserted here, indemnity for losses that
12 RFC had to pay out to creditors, the statute of limitations
13 does not begin to run on those claims until the indemnity --
14 the obligation for which you seek indemnity is fulfilled.

15 And so the -- if they want to raise a defense of
16 statute of limitations they can do so. If they want to make
17 a Motion to Dismiss based on statute of limitations
18 grounds --

19 THE COURT: Well, let me ask you this. Is this
20 the complaint you think you're gonna prevail on? In other
21 words, as I understand it there's still going to probably
22 be -- if I grant your motion.

23 MR. CALAMARI: Um-hum.

24 THE COURT: It sounds to me like they are going to
25 make a Motion to Dismiss it making all these same arguments

1 again.

2 MR. CALAMARI: Um-hum.

3 THE COURT: Is it -- you're confident that this
4 complaint will survive a Motion to Dismiss, correct?

5 MR. CALAMARI: We are very confident that the
6 complaint will survive the Motion to Dismiss. If your Honor
7 is suggesting that leave to amend would be granted but we
8 should take into account what we've heard in argument and
9 put in an amended complaint to the extent we think we
10 should --

11 THE COURT: I'm not suggesting anything. I'm
12 asking questions.

13 MR. CALAMARI: Okay. Well, yes, we are very
14 confident that this complaint would survive a Motion to
15 Dismiss and we would -- we would --

16 THE COURT: And if it doesn't, if a Motion to
17 Dismiss is granted, what happens next? Would there be yet a
18 new amended complaint or a request to amend the complaint or
19 file a new lawsuit or are we gonna be done at that point?

20 MR. CALAMARI: I can't say what would happen next.
21 Obviously it would depend on the grounds that the Court,
22 assuming it didn't sustain the complaint, assuming the Court
23 dismissed the complaint on some grounds, if the grounds were
24 curable, I certainly would think we would ask for leave to
25 cure those grounds. That would not be unusual. In the

1 course of litigation, the complaint is supposed to provide
2 notice of claims. It's not supposed to be a document that
3 outlines an entire case. However, you know, again, if the
4 grounds could not be cured, that that -- that the Court
5 cited, then more than likely it would result in an appeal
6 rather than yet another attempt to amend.

7 THE COURT: And what about the contention that
8 your client is not constrained by the usual economic
9 constraints by reason of the fact that it's an estate in
10 bankruptcy?

11 MR. CALAMARI: I think that's rhetoric for an
12 argument here. There is a liquidating trust, ResCap, which
13 took over responsibility for these claims. The trust is
14 funded. I understand our obligations under Rule 11. We
15 take them very seriously. I understand that there could be
16 claims that, if we pursue them, that might be subject to an
17 attorney's fees to a prevailing party. I don't have any
18 reason to believe --

19 THE COURT: Is that trust sufficiently funded to
20 provide payment of attorney's fees if they are the
21 prevailing party?

22 MR. CALAMARI: Yeah, I believe that it is. I
23 don't want to -- to make a statement on the record in court
24 that I don't know absolutely certainly, but I believe the
25 trust is more than sufficiently funded to make an award of

1 attorney's fees. The trust has got substantial funding.
2 It's paid out billions of dollars in claims, and it has
3 numerous claims to administer. There is a reserve. I'd
4 imagine the reserve is a public number but I did not
5 represent the trust in the bankruptcy and I don't know the
6 numbers. But that is certainly, to me, a red herring here.
7 I can't imagine that there is not sufficient money to cover
8 an attorney's fees award if that were to happen.

9 THE COURT: Okay. All right.

10 MR. JENKINS: May I respond briefly, your Honor?
11 Just two points.

12 THE COURT: 30 seconds.

13 Were you done, Mr. Calamari?

14 MR. CALAMARI: Yes, unless you had other
15 questions.

16 THE COURT: No, that was it. Thank you.

17 MR. JENKINS: Two quick points, your Honor.

18 Bankruptcy tolling. We actually dispute that
19 bankruptcy tolling would apply because that particular
20 federal statute applies only to claims brought by a trustee
21 or a debtor in possession. Upon plan confirmation on
22 December 17th, RFC was no longer a debtor in possession. So
23 we don't think that provision applies.

24 But more appropriately for the pleadings analysis,
25 it's not in the pleadings. They didn't even address our

1 statute of limitation argument in their reply brief. So
2 it's -- any contention that there may be some tolling
3 mechanism at work here, not in the complaint, not in the
4 First Amended Complaint, not in their reply brief. So if
5 they want tolling, the rule is they need --

6 THE COURT: Yeah, but isn't the statute of
7 limitations a defense? You plead that in your answer. You
8 say this claim should be dis -- or a Motion to Dismiss, it
9 should be dismissed because statute has expired. Or a
10 defense to it in answer to paragraphs 1 through 40 whatever,
11 we contend that statute of limitations has expired.

12 MR. JENKINS: We do cite several cases in our
13 papers, in our opposition, the *Enervations* case and the
14 *Streambend* case, that say when the claims in a complaint are
15 clearly and facially time barred, that -- and there's no
16 factual allegation that would support the application of
17 equitable tolling, then the claim is properly dismissed on
18 the 12(b)(6) motion, and on some occasions Rule 11 sanctions
19 have been imposed.

20 The final issue, your Honor, goes to the issue of
21 indemnification and Mr. Calamari's characterization of when
22 the statute of limitation accrues. If all of the
23 indemnification claims are predicated on breaches of
24 representations and warranties, there are no cases outside
25 the context of an insured's duty to indemnify that say that

1 indemnification claims accrue only upon the incurment [sic]
2 of a judgment or settlement that gives rise to
3 indemnification.

4 So the statute of limitation for both claims, both
5 of which are predicated in breach of contract, are the same.
6 And with that I thank your Honor for his time.

7 THE COURT: Okay. Thank you all for coming.
8 Thank you for enduring our Minnesota winter, even though
9 it's spring. I'll take the matter under advisement, issue
10 an order shortly, and we are in recess or do we start the
11 other one at 10:00 and we're now 20 minutes late? So we're
12 in recess.

13 MR. CALAMARI: Thank you, your Honor.

14 MR. JENKINS: Thank you, your Honor.

15 (Court adjourned at 10:21 a.m.)

16 * * *

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18 I, Carla R. Bebault, certify that the foregoing is
19 a correct transcript from the digital audio recording of
20 proceedings in the above-entitled matter, transcribed to the
21 best of my skill and ability.

22
23 Certified by: s/Carla R. Bebault
24 Carla Bebault, RMR, CRR, FCRR
25